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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANN DANIEL AND LEONARD HILL,

Petitioners,

v.

COUNTY OF SANTA BARBARA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a county may take a permanent easement over private property, and thereby deprive the owner of the right to exclude, without satisfying either the nexus or proportionality requirements of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987) or *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), and without paying just compensation, solely because 11 years earlier the State was able to extort from a prior owner an offer to dedicate that easement, not for any consideration but by sheer intimidation and threats of significant fines?

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption. The following were named with respondent as defendants-appellees in the proceedings before the United States Court of Appeals for the Ninth Circuit: "All Persons Unknown, Claiming any Right, Title Estate Lien or Interest in or to the within Described Property" and "Does, 1-1000 inclusive."

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Ann Daniel and Leonard Hill, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-15a) was entered on April 18, 2002, and is reported at 288 F.3d 375 (9th Cir. 2002). This opinion replaced a previous opinion of the court of appeals that was entered on March 12, 2002, and is available at 2002 WL 378131. The order of the court of appeals denying the petition for rehearing and the suggestion for rehearing *en banc*, and withdrawing and replacing its prior opinion (Pet. App. 1a-2a) was entered April 18, 2002, and is reported at 288 F.3d 375 (9th Cir. 2002). The opinion of the United States District Court for the Central District of California, granting respondent's motion to dismiss petitioners' Fifth Amendment takings claim without leave to amend (Pet. App. 16a-46a), is not reported.

JURISDICTION

The court of appeals entered its judgment and its order denying petitioners' petition for rehearing and suggestion for rehearing *en banc* on April 18, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides in part:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

This case presents a single question essential to the continued vitality of the promise of the Takings Clause: May local governments evade the restrictions on compelled dedication of public access easements that this Court announced in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), by taking private property in two discrete steps, each of which is immune from a takings challenge under the decision below? In *Nollan*, this Court condemned as "'an out-and-out plan of extortion'" a decision in which the California Coastal Commission approved a building permit on the condition that the property owner grant the public an easement that was wholly unrelated to any adverse impacts caused by the proposed construction project. *Id.* at 837. This case involves a far more egregious scheme of extortion. Just days after this Court heard oral argument in *Nollan*, the Coastal Commission forced petitioners' predecessors-in-interest to record an offer to dedicate an easement passing directly through their yard – an offer that would expire in 25 years unless accepted by another local governmental entity. The Commission gave *no* consideration in exchange for this offer to dedicate; petitioners' predecessors only recorded the offer under threats of significant fines.

The court of appeals ruled that, 11 years after *Nollan*, the County of Santa Barbara was free to accept this coerced offer to dedicate without paying a penny of compensation for the resulting easement. According to the lower court, because no takings challenge was asserted against the *Commission's* 1987 coerced offer to dedicate, petitioners were barred from challenging the *County's* 1998 legally distinct governmental action of accepting that offer. Yet because the Commission's 1987 action did not strip the prior owners of any possessory interest in their property – indeed they were free to use and

exclude others from it – any challenge seeking redress for a physical taking was plainly unripe in 1987. Absent intervention by this Court, government entities across the nine western states within the Ninth Circuit will be free to accept hundreds of soon-to-expire offers to dedicate property, coerced in blatant violation of the restrictions announced in *Nollan*, without regard to the fundamental protection of property owners against uncompensated takings.

1. *The Regulatory Backdrop.* In the late 1970s, without legislative authorization, the Coastal Commission implemented a policy of refusing to issue building permits unless coastal property owners recorded offers to dedicate easements to the public. These offers were temporary in nature; if not accepted by a local agency within 21 years, they would automatically expire. Conversely, acceptance conveyed to the accepting agency actual title of the easement and the right to occupy it in perpetuity.

At the time these offers were coerced, their acceptance was uncertain for two reasons. First, an accepting entity had to ensure that it was able to assume the potentially significant liabilities and maintenance costs that attend ownership of public beach property. *Whalers' Village Club* v. *California Coastal Comm'n*, 220 Cal. Rptr. 2, 14 (Cal. Ct. App. 1985). Second, because local governments would not accept an easement that the public could not reach (and thus could not use), acceptance of an offer to dedicate often depended on the Coastal Commission's ability to extort other offers to dedicate easements over neighboring properties. This, in turn, depended on whether the owners of such neighboring property would seek approval for some improvement to their property, and then succumb to the Commission's coercion. See generally *Grupe* v. *California Coastal Comm'n*, 212 Cal. Rptr. 578, 592, 601-02 (Cal. Ct. App. 1985).

2. *Factual Background.* The petitioners own a single family home on a small parcel just 15 miles from the property at issue in *Nollan*. In 1987 petitioners' predecessors-in-

interest, the Bucklews, received a letter from the Coastal Commission demanding they immediately record an offer to dedicate an easement passing directly through their yard or face significant fines. The Commission did not predicate this threat on any action or request of the Bucklews, who had never sought the Commission's approval for any purpose. Instead, the Commission purported to rely on conditions imposed on permits issued over 10 years earlier to the Bucklews' predecessor-in-interest, Johnson. For unexplained reasons, the Commission never requested that Johnson execute or record either of these offers.[1] More than a decade after Johnson was issued the second of these permits, and while the *Nollan* case was pending before this Court, the Commission threatened the Bucklews with a fine of $10,000, plus additional fines of $5,000 per day thereafter, unless they executed the offer to dedicate that the Commission had demanded 10 years earlier from Johnson. In the face of this threat, the Bucklews signed and recorded an offer to dedicate a public lateral easement, unsupported by any consideration, passing directly across their yard. This offer was to expire unless it was accepted by a public agency within 25 years of recordation, a condition that effectively added 13 additional years to the offer the Commission had originally coerced from Johnson. Notably, the Commission extracted this offer just one week after oral argument had taken place before this

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[1] Johnson sought Commission approval in 1974 for a permit to subdivide his parcel into four separate lots. Approval of that permit was conditioned upon Johnson offering to dedicate the same type of easement as the one at issue in this case. Johnson appealed that condition to the Commission, but was unsuccessful. Nevertheless, he proceeded with the subdivision of his parcel. For unexplained reasons, the Commission never requested he execute and record an offer to dedicate. In 1977, Johnson again sought Commission approval, this time for a permit to construct a residence on one of his newly divided parcels. Once again, the Commission conditioned approval of this permit upon his offering to dedicate the same type of easement as the one at issue in this case. Johnson proceeded with construction of the residence, but once again the Commission did not seek to implement this condition.

Court in *Nollan*, a fact the Commission neglected to mention to the Bucklews.

By the late 1990s, the Commission had collected over 1,200 offers to dedicate public easements across private coastal property, the vast majority of which had not been accepted. Realizing that hundreds of outstanding offers to dedicate would soon expire, the Coastal Commission began urging local governments to expedite the acceptance process for all offers pending in their respective jurisdictions. On September 15, 1998, the County of Santa Barbara suddenly notified petitioners that it intended to conduct a public hearing on October 6, 1998, to consider whether to accept 72 outstanding offers to dedicate easements over coastal property located in the County, including the offer to dedicate recorded by the Bucklews. The petitioners were surprised, since they had good reason to believe that the County would not flaunt *Nollan* and try to enforce the pre-*Nollan* offer.

On October 5, 1998, petitioners recorded a Notice of Revocation and/or Rescission of Offer to Dedicate Public Access Easement with the Santa Barbara Recorder's Office. The Notice was recorded to give effective legal notice to all interested parties of petitioners' claim that the offer to dedicate was invalid given its failure to comport with the restrictions announced in *Nollan* and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). On the same day the Notice was recorded, petitioners sent the Notice to the County, advising it that they had revoked the offer. Pet. App. 24a.

The County proceeded with its efforts to accept the offer to dedicate that the Coastal Commission had originally extracted from the Bucklews, despite the petitioners' appearances before the County – in person and in writing – asking that it *not* accept the offer. On October 20, 1998, the County brushed aside petitioners' pleas and adopted a resolution accepting the easement across their property. In so doing, the County refused to consider whether acceptance would violate petitioners' constitutional rights in light of *Nollan* and *Dolan*.

The County made no effort to show that its acquisition of the easement satisfied the nexus or proportionality requirements of the Fifth Amendment and instead simply recorded its acceptance of the offer to dedicate.

On November 24, 1998, the Commission issued petitioners a "cease and desist" order, directing them to cancel their Notice of Revocation and to refrain from engaging in any further activities that would be inconsistent with the previously recorded offer to dedicate. This order exposed petitioners to civil penalties of up to $6,000 a day for failure to comply and up to $15,000 per day for failure to comply with the original permit condition. See Cal. Pub. Res. Code §§ 30821.6 & 30820(b).[2] Faced with this threat, petitioners withdrew the Notice.

3. *Proceedings Below.* Petitioners filed this action against the County less than 30 days after it accepted the offer to dedicate. The complaint, as amended, alleged that the County's acceptance of the offer to dedicate constituted a taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and sought, *inter alia*, injunctive and declaratory relief under 42 U.S.C. § 1983.

The County filed a motion to dismiss. Notably, it did not contend that its acceptance of the offer to dedicate was lawful under *Nollan* and *Dolan*. Instead, the County alleged, *inter alia*, that petitioners' challenge was an untimely and improper collateral attack on the *extorted offer to dedicate* and thus was barred by principles of res judicata and waiver. Relying on Section 30801 of the California Public Resources Code, which governs judicial review of Coastal Commission decisions, the County argued that any taking challenge

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[2] These threats were not fanciful. The Commission recently brought suit seeking fines amounting to potentially tens of millions of dollars against an individual property owner who attempted to rescind a similar offer. *See* Petition for a Writ of Certiorari at 19, *Cole* v. *County of Santa Barbara*, No. 01-1173 (U.S. filed June 3, 2002).

petitioners asserted could only have been brought within 60 days of the Coastal Commission's extraction of the 1987 offer. Petitioners opposed the motion, noting that their challenge was to the *County's* 1998 acceptance of the exacted offer, a challenge which was plainly timely under 42 U.S.C. § 1983. Nevertheless, on October 14, 1999, the United States District Court for the Central District of California granted the County's motion to dismiss petitioners' complaint.

The Ninth Circuit affirmed that judgment in an opinion filed on April 18, 2002.[3] Significantly, the court of appeals' decision did not dispute petitioners' showing that, long after the *Commission* extracted the 1987 offer, they retained valuable property rights in the portion of the land subject to the offer, and that those rights were not extinguished until 1998, when the *County* accepted the offer. Instead, the court held that any challenge to the County's acceptance was an impermissible attempt by petitioners to revive the time-barred claims of their predecessors-in-interest, *viz.*, petitioners' attack on the County's acceptance was an attack on the offer the Commission extracted from the Bucklews in 1987. Pet. App. 6a.

Petitioners argued that forcing individuals to pursue a takings claim that sought compensation for the loss of the right to exclude as soon as an offer to dedicate was coerced would effectively force individuals to seek redress in the courts prematurely, and that such premature claims would be subject to dismissal on ripeness grounds. But the court of appeals dismissed this argument, stating that a ripe regulatory takings claim may have existed once the Commission affirmed the 1974 permit condition requiring the very first offer coerced from Johnson, for then "the conditions on which

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[3] The Ninth Circuit originally affirmed the judgment in an opinion filed on March 12, 2002. After petitions for rehearing with suggestions for rehearing *en banc* were filed by both parties, the Ninth Circuit withdrew its prior opinion and affirmed the judgment in the opinion it filed on April 18, 2002. *See* Pet. App. 1a-2a.

[petitioners' predecessors] would be permitted to subdivide [their] parcel were 'known to a reasonable degree of certainty,' and the Commission's action was final." Pet. App. 7a (citation omitted) (quoting *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 620 (2001)). The court then noted that, if petitioners' claim was analyzed as a physical taking, a claim could have ripened at the time the offers to dedicate were exacted from petitioners' predecessors-in-interest, *viz.*, in 1987. *Id.* at 9a.[4]

REASONS FOR GRANTING THE PETITION

The court of appeals adopted a procedural bar that shields from review, and thereby effectively sanctions, flagrant evasions of the constitutional restrictions this Court has placed on the use of local zoning powers to take private property. That procedural bar allowed the County of Santa Barbara, in plain contravention of this Court's holdings, to take an easement without paying a penny in compensation, or making any showing that the easement was appropriately tied to any land-use request for which petitioners sought regulatory approval. The California Coastal Commission, moreover, has made clear its determination to preserve, by whatever means necessary, "the vitality of the many unaccepted offers of dedication" that it has previously coerced, and to encourage other local governmental bodies to accept as many of these soon-to-expire offers as possible. *Amicus Curiae* Brief of California Coastal Commission in Support of Respondent County of Santa Barbara at 2, *Cole* v. *County of Santa Barbara*, No. B147339 (Cal. Ct. App. Dec. 17, 2001). The Ninth Circuit's failure to prevent such an

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[4] The court of appeals also held that the injunctive and declaratory relief petitioners sought was not available under 42 U.S.C. § 1983. The question of what relief is available for a violation of the Takings Clause is before this Court in *Washington Legal Foundation* v. *Legal Foundation*, 70 U.S.L.W. 3751 (U.S. June 10, 2002) (No. 01-1325).

open flouting of this Court's rulings is a compelling ground, in and of itself, to warrant review of the decision below.

But the blatant disregard for this Court's precedents is not all that justifies plenary review of the decision below. The procedural bar adopted by the Ninth Circuit rests on two related errors of constitutional law, each of which warrants review by this Court. First, the lower court failed to recognize the legally distinct property deprivation that the County's 1998 conduct caused. Notwithstanding the Coastal Commission's 1987 coerced offer to dedicate an easement, from 1987 to 1998 petitioners and their predecessors continued to enjoy the right to use and exclude others from their property. It was not until the County's 1998 acceptance of the offer to dedicate that petitioners were stripped of these most fundamental of rights. By failing to recognize the separate and far more significant deprivation the County's conduct caused, the lower court allowed the County to violate petitioners' constitutional rights with impunity.

Moreover, the lower court's decision creates a procedural bar that is flatly irreconcilable with the ripeness doctrine as applied in the takings context. Because none of the Coastal Commission's various acts of coercion in the 1970s and 1980s stripped petitioners of their right to exclude others or compelled such a deprivation, no takings claim seeking compensation for the loss of this right could have been brought in any challenge prior to the County's 1998 decision to accept the offer. Plainly, any challenge to *County* conduct that did not occur until 1998, and that might never have occurred, was in no sense "ripe" in 1987 at the time the offer was coerced and was therefore non-justicable prior to 1998.

The erroneous decision below allowed the County to escape its "categorical duty" to pay compensation for an appropriation of property that "dispossess[ed] the owner [of its] right to exclude others," *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1478, 1480 n.19 (2002), and improperly allowed the

Commission "to put an expiration date on the Takings Clause." *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 627 (2001). Absent review by this Court, these constitutional violations will by no means be isolated. The decision below clears the way for the acceptance of hundreds of other coerced offers to dedicate easements that are due to expire in the next few years – offers that the Coastal Commission is making every effort to ensure are accepted. In addition, the court of appeals' decision provides a clear roadmap for other government entities in the nine western states of the Ninth Circuit to follow to escape the commands of *Nollan* and *Dolan* and appropriate valuable property rights without paying any compensation.

I. THE COUNTY'S ACCEPTANCE OF THE OFFER TO DEDICATE WAS ITSELF AN UNCONSTITUTIONAL TAKING OF PROPERTY.

The decision below raises a fundamental question of constitutional law: when one governmental agency forces a property owner to record an *offer* to dedicate a public access easement that does not satisfy the substantial nexus requirement announced in *Nollan* and *Dolan*, and a separate governmental entity later *accepts* that offer, does the latter decision work a legally distinct deprivation of property without just compensation? The court of appeals concluded that it does not, and that any constitutional injury the property owner suffers stems from the initial decision to compel the offer. That conclusion, which is the central predicate underlying the procedural bar created by the court of appeals, is demonstrably wrong.

Although state law defines the property interests that the Takings Clause protects, see *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980), whether and when a compensable taking has occurred are questions of federal law. In this case, the Coastal Commission did not require any of the prior property owners to convey title to the easement outright. Rather, it demanded that they record an

offer to dedicate an easement. By its terms, this offer to dedicate was made irrevocable for a period of 25 years; if it was not accepted during that period, the offer would expire.

It is a well-settled principle of California law that, when an offer to dedicate an easement is made, the public does not thereby "acquire any right to the easement." *People* v. *Williams*, 2 P. 393, 396 (Cal. 1884). Rather, an unconditional acceptance is required to complete a dedication. *Baldwin* v. *City of Los Angeles*, 83 Cal. Rptr. 2d 178, 187 (Cal. Ct. App. 1999). "A dedication without acceptance is, in law, merely an offer to dedicate, and such offer *does not impose any burdens nor confer any rights*," unless there is an acceptance. *City of Santa Clara* v. *Ivancovich*, 118 P.2d 303, 307 (Cal. Ct. App. 1941) (emphasis added); see also *Grupe*, 212 Cal. Rptr. at 592 (an offer to dedicate "will become effective *only* if accepted by a public agency"). Indeed, this is a principle the Commission itself explicitly recognizes: "[Offers to dedicate] are only *offers* of easements however. *The interest belongs to the property owner until the offer is accepted* by a government agency . . . ." California Coastal Commission Public Access Action Plan (June 1999), at 14 (second emphasis added), Pet. App. 47a.

The obvious corollary to this rule is that an offer to dedicate does not itself divest the property owner of the right to use or exclude others from that property. To the contrary, petitioners' immediate predecessors-in-interest, the Bucklews, retained the essential bundle of rights that attend ownership of property long after the 1987 offer was extracted. Indeed, in *Grupe*, the court explained that an offer to dedicate, such as the one at issue here, created "no easement and respondent can exclude the public from the privately owned portion of his beach until such time as a public agency . . . agrees to accept the offer and the concomitant responsibility to police the beach." 212 Cal. Rptr. at 592. See also *Whalers' Village Club*, 220 Cal. Rptr. at 15 (Commission abused its discretion in denying a landowner the right to exclude the public from

property prior to acceptance of an offer to dedicate, because such a denial improperly "turns the offer to dedicate public access into an immediate easement").

Accordingly, even after the Coastal Commission required the Bucklews to record an offer to dedicate an easement, they retained full use and possession of the property in question, including "one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Nor did the Commission's exaction render the loss of these rights inevitable. To the contrary, the likelihood that the easement would be accepted was quite minimal. See *Grupe*, 212 Cal. Rptr. at 592, 601-02; see also *supra* at 3. And of course, if no public agency formally accepted the offer to dedicate within 25 years of recordation, the offer would expire by its terms and the property owner would retain title completely unburdened by the offer. See 212 Cal. Rptr. at 602.

It is thus clear that it was the County's acceptance of the offer to dedicate in October 1998, and not the Coastal Commission's 1987 exaction of that offer, that deprived petitioners of their right to use and to exclude others from their property. As a result of the County's acceptance, petitioners are forced to bear a "'permanent physical occupation'" of their property, subject to the public's unfettered right to use the land "to pass to and fro," *Nollan*, 483 U.S. at 832, and petitioners' right to exclude others has been permanently extinguished. See *Copeland* v. *City of Oakland*, 23 Cal. Rptr. 2d 719, 723 (Cal. Ct. App. 1993) (upon acceptance of an offer to dedicate, "'the property is thereafter held in trust for public use'" and is "'no longer subject to private control'"). The County's acceptance of the

offer to dedicate worked a legally distinct deprivation of property for which petitioners have a takings claim.[5]

To support the proposition that a taking occurs when an offer to dedicate an easement is granted, and not when that offer is exercised, the court of appeals relied upon *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). But this Court in *Lucas* was careful to note that there is no taking when an antecedent inquiry into the nature of a property owner's estate reveals that "the proscribed use interests were not part of [the landowner's] title to begin with." See *id.* at 1027. In contrast, as demonstrated above, California law is unambiguous that the offer to dedicate at issue in this case was not a preexisting limitation on petitioners' ability to exclude others. Thus, in no sense did the offer to dedicate impose a preexisting limitation on certain of petitioners' fundamental rights with respect to the portion of their land subject to that offer. Rather, this limitation inhered only after the County exercised its own discretion and chose to accept the original offer to dedicate. If anything, *Lucas* demonstrates that this Court has expressly rejected the very proposition endorsed by the Ninth Circuit.[6]

Although the Coastal Commission's decision to impose the unconstitutional condition was a necessary predicate for the County's later decision to accept the offer to dedicate, the two decisions are logically and legally distinct. In accepting the

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[5] This same analysis applies even if the Court accepts the Ninth Circuit's erroneous view that the offer coerced for no consideration from the Bucklews in 1987 was a mere renewal of the unrecorded offers the Commission extorted from Johnson in 1974 and 1977. Whether the County accepted an offer that was made in 1987, or made in 1974 and simply "renewed" thereafter, it was the 1998 act of acceptance that first deprived any property owner of the right to exclude others.

[6] The decision below also relied on *United States* v. *30.54 Acres of Land*, 90 F.3d 790 (3d Cir. 1996) to support the same proposition. Yet *30.54 Acres* merely reiterates and applies the teachings of *Lucas* which, as discussed, do not support the procedural bar created by the Ninth Circuit. *Id.* at 795.

offer to dedicate, the County made its own purely discretionary decision that was not compelled by the original permit condition. See *Grupe*, 212 Cal. Rptr. at 592 (noting that it was unlikely that a public agency would actually accept the offer to dedicate at issue in that case). In making this decision, moreover, the County had an independent duty to respect the constitutional rights of property owners. Its decision to accept an easement that was patently inconsistent with the requirements of *Nollan* and *Dolan*, therefore, is a legally separate governmental act that caused an injury that the original extraction made possible but did not, by itself, cause. See *Whalers' Village Club*, 220 Cal. Rptr. at 14-15.[7]

In short, although the same constitutional flaw infects both the Coastal Commission's action and that of the County, the County's acceptance of the offer to dedicate resulted in a constitutional injury that the Commission's permit decision alone did not cause. This Court should grant review in order to make clear that the dictates of the Takings Clause cannot be circumvented by state efforts to appropriate private property in two steps rather than one.

II. THE PROCEDURAL BAR CREATED BY THE COURT OF APPEALS' DECISION IS IRRECONCILABLE WITH THIS COURT'S RIPENESS DOCTRINE.

The decision below also rests on a fundamental misapprehension of federal ripeness principles. That mistake

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[7] Under the contrary, and misguided, reasoning of the lower court, a local government would today be free to accept an offer to dedicate an easement for a "whites only" beach that a permitting body coerced when de jure racial segregation practices were under legal attack but had not yet been deemed unconstitutional or proscribed by any federal statute. Although the same equal protection violation would inhere in both the permit and the subsequent acceptance decision, it is perfectly clear that a decision to accept such an unlawful offer gives rise to a separate constitutional wrong by a separate state entity bound to respect constitutional rights.

led the lower court to adopt a procedural rule that bars judicial review of a valid takings claim, and thereby impermissibly "relieve[s] [the State] of the duty to provide compensation." *First English Evangelical Lutheran Church* v. *County of Los Angeles, Cal.*, 482 U.S. 304, 321 (1987). As it did in *First English*, this Court should grant review to correct this constitutional error and to make clear that the "failure" to bring a plainly unripe claim cannot serve as the basis for precluding judicial review of a scheme that sidesteps the dictates of the Takings Clause.

That a property owner may not pursue a takings challenge until there has been a final government decision is well-established. See *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985); see also *Palazzolo*, 533 U.S. at 620, 621 (as a general rule a taking is not ripe until "a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation" such that the "extent of the restriction on property is . . . known"). Under California law, it is clear that no state agency made a final decision to divest petitioners of their right to use and exclude others from their beachfront property until the County's 1998 decision to accept the offer to dedicate. Any claim seeking redress for a physical taking would have been entirely premature in 1987; at that time, and for more than a decade thereafter, no one knew whether, or when, a public agency might decide to accept the offer to dedicate. See *Grupe*, 212 Cal. Rptr. at 602 ("the Commission cannot know with certainty whether future events will occur that as a practical matter are essential to implementation of [an offer to dedicate]").

The court of appeals' conclusion that petitioners' claims were barred by the "failure" of their predecessors-in-interest to file a takings claim for the Commission's coerced offer is flatly inconsistent with these ripeness principles. Under this Court's precedents, it is clear that any challenge to the taking caused by the County's acceptance of the offer to dedicate

was unripe when the offer to dedicate was recorded, and that petitioners' predecessors could not have brought (and thus could not have waived) any challenge to that extraction in 1987. Indeed, the court of appeals' flawed reasoning would allow a recording landowner to obtain an undeserved windfall – she would be entitled to government compensation for the full value of a property loss that might never come to pass if the offer to dedicate expired without acceptance, or, as actually happened here, that might be suffered by another. See *Danforth* v. *United States*, 308 U.S. 271, 284 (1939) ("compensation is due at the time of taking, [and] the owner at that time, not the owner at an earlier or later date, receives the payment").

In ruling otherwise, however, the lower court reasoned that, because the existence of the offer to dedicate was a matter of public record when petitioners purchased the property, it could be presumed that their purchase price was reduced by the full value of the easement and that they had therefore suffered no injury, even though no evidence in the record supported this presumption. Moreover, the decision below reasoned that under the view advanced by petitioners:

> no land-use restriction would ever be safe from a takings challenge. Every new purchaser could bring a takings challenge even if there had been a taking for which the prior owner had already been compensated; if the prior owner had already litigated and lost a takings challenge to that restriction; or if the prior owner had allowed application [sic] limitations periods to lapse without creating a ripe takings claim or challenging an already-ripe claim.

Pet. App. 12a.

The court's reasoning is flawed in two respects. First, it ignores the speculative nature of governmental acceptance of an offer to dedicate, an event contingent on a number of factors, some of which were beyond the control of any

governmental entity. See *Baldwin*, 83 Cal. Rptr. 2d at 187; *Grupe*, 212 Cal. Rptr. at 592, 602; *Whalers' Village Club*, 220 Cal. Rptr. at 14. In light of these holdings, and the fact that, in the 1970s and 1980s, the Commission had not even embarked on its plan vigorously to urge local governments to accept outstanding offers to dedicate easements, it is simply incorrect to presume that petitioners' purchase price reflected the value of the property minus the full value of the easement. Second, petitioners do not challenge a restriction which the prior owners could have previously litigated or for which they could have been compensated. Rather, they seek relief for the taking that occurred in October 1998 as a result of the County's acceptance of the offer to dedicate, a claim that plainly could not have been brought by anyone other than petitioners.

In any event, it is clear that judicial review of valid takings claims cannot be foreclosed based on the considerations endorsed by the court below. In *Palazzolo*, this Court flatly rejected a rule that a successive title holder with notice of an existing limitation has no right to be free from an uncompensated taking. Condemning such a bar as "too blunt an instrument to accord with the duty to compensate for what is taken," this Court held it would be illogical and unfair to allow the state to secure a windfall where, as here, ripeness principles prevented petitioners' predecessors from maintaining the claim petitioners now bring. 533 U.S. at 628.

This Court should continue to reject procedural bars that seek to compel the bringing of takings claims that, under this Court's precedents, are plainly unripe, particularly where, as here, a "failure" to bring such an unripe claim then forms the basis for precluding *any* judicial review of an unquestionably meritorious takings claim. The decision below improperly forecloses the redress, contemplated by 42 U.S.C. § 1983, based on a procedural waiver rule that is irreconcilable with governing ripeness principles.

III. UNLESS THIS COURT GRANTS REVIEW, HUNDREDS OF OTHER UNCONSTITUTIONAL DEPRIVATIONS WILL ESCAPE JUDICIAL REVIEW.

Absent this Court's intervention, the unconstitutional taking of property that occurred in this case will not be isolated: government entities throughout the nine western states in the Ninth Circuit will understand they are free to accept outstanding offers to dedicate without satisfying the commands of the Fifth Amendment. First, hundreds of other offers to dedicate easements that California's Coastal Commission coerced are due to expire soon, and the intention to secure acceptance of as many of these easements as possible is well-documented. See James Rainey, *Faster Action by Agencies Is Preserving Beach Access*, L.A. Times, July 10, 2000, at A3, *available at* 2000 WL 2258956.

Indeed, unless this Court grants review, it is unlikely that other property owners will even attempt to challenge such acceptance decisions. In its zeal to obtain acceptance of hundreds of outstanding offers to dedicate, the Coastal Commission has taken extraordinary steps against those resisting such efforts, threatening them personally with fines amounting to potentially tens of millions of dollars. See, *e.g.*, Petition for a Writ of Certiorari at 19, *Cole* v. *County of Santa Barbara*, No. 01-1173 (U.S. filed June 3, 2002). Should this Court deny review here, few litigants will have either the financial wherewithal or the resolve to withstand such administrative intimidation in the future. This Court condemned the Coastal Commission's strong-arm tactics in *Nollan*; it should not blink at them now when the effect will be precisely the same, *viz.*, uncompensated takings of property.

Second, the decision below provides a clear roadmap that other government entities can use to escape this Court's holdings in *Nollan* and *Dolan*. Rather than employ direct extortion as in *Nollan*, government entities will simply use the

"offer to dedicate" scheme to avoid paying for their takings. Most landowners will have little incentive to mount a takings challenge to a coerced offer to dedicate given that (1) any such challenge would be dismissed on grounds that it is unripe, see *supra* at 14-16, and (2) the remote possibility that such an offer will ever affect the current landowner. Thus, the government can extract such offers with impunity, wait years to implement the actual taking, and resist subsequent compensation claims based on the waiver and statute of limitations principles endorsed by the decision below. The resulting procedural bar prevents the truly injured landowner from challenging the real taking because no one could have, consistent with this Court's ripeness doctrine, acted in response to the relatively trivial action taken earlier. This Court should grant the petition in order to ensure that the procedural bar adopted below does not render the promise of *Nollan* and *Dolan* completely illusory.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.[8]

Respectfully submitted,

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[8] Should the Court also grant the petition filed in *Cole* v. *County of Santa Barbara*, No. 01-1773 (U.S. filed June 5, 2002), petitioners respectfully request that the Court grant this petition and consolidate the cases for briefing and argument. Alternatively, petitioners request that this Court, at a minimum, hold this case pending the disposition of *Cole*.